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No. 96-1902

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JAMES E. BUTLER, JR.,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. Respondent Concedes That No Underlying Action Was Pending Before The Fourth Circuit, Yet Identifies No Independent Basis For That Court's Jurisdiction.

Petitioner urges that a civil compensatory contempt claim may proceed only so long as it is collateral and incidental to an ongoing civil proceeding. *See* Pet., 24-27. Neither the Constitution nor any federal rule or statute creates an independent cause of action or an independent basis of jurisdiction to pursue such a claim. *See id.*

In the very first sentence of its opposition brief, respondent GM concedes that "[t]his case grew out of a *separate* products liability action" between one of Butler's clients and GM: the *Cameron* action. Opp., 1 (emphasis added). GM further concedes that, while the *Cameron* action settled in December 1994, this "separate action" proceeded. *See id.*, 6.[1/] Like the court below, however, GM fails to identify any *independent legal basis* on which the court of appeals could have retained jurisdiction to proceed with this case after the *Cameron* litigation ended. *See id.*, 15-17.

Instead, GM mischaracterizes the issue, arguing that nothing about the disposition of the underlying *Cameron* case could have undermined the "ongoing vitality" of the Fourth Circuit's March 23, 1994 order, which "remains binding law to this day." *Id.*, 16, 15. The vitality of the Fourth Circuit's March 23 order, however, is not the issue; the issue is whether the Fourth Circuit had any *judicial power* to entertain GM's contempt claim after the only case that was properly

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[1/] GM actually states that the *Cameron* suit settled in December *1995*, but this is an error. *Compare* Opp., 6 *with* Pet., 11 *and* Pet. App., 5a n.2.

before it—the *Cameron* case—had terminated.[2/]

On this issue, there is indeed a clear conflict among the circuits. The Fourth Circuit here and the Fifth Circuit have both held that civil contempt claims may proceed after the disposition of the underlying cases from which they arise. *See* Pet., 8a n.3; *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 400 (5th Cir. 1987). By contrast, the Seventh and Eleventh Circuits have held that "'[c]ivil contempt proceedings are considered to be a part of the action from which they stem,'" and "'there is no such thing as an independent cause of action for civil contempt.'" *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d 455, 459 (7th Cir. 1993) (citations omitted); *accord Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988) (per curiam).[3/]

GM attempts to distinguish the latter cases by arguing that, in those cases, "the question was whether a litigant could file a separate and distinct cause of action for contempt." Opp., 17. Here, however, GM has already admitted that this case, too, is a "separate" and distinct case from the previously terminated *Cameron* action, and it could not seriously contend otherwise. *Id.*, 1. The two cases seek different relief for

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[2/] As Butler has noted, in contrast to the Fourth Circuit, both the Georgia state court in *Moseley* and the Kansas federal court in *Cockrum* did have the power to recognize and enforce any "ongoing vitality" in the Fourth Circuit's order and both were better positioned to do so. *See* Pet., 28 n.13; 29. GM has never explained why it failed to seek any needed remedy in those courts.

[3/] The fact that a separate panel of the Fourth Circuit reached a conclusion that conflicts with the holding below does not signal the absence of "the circuit split alleged by Butler" (Opp., 17); rather, it only underscores the lower courts' confusion. *See Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996) (implicitly contradicting the decision at issue here). In any event, the circuit split exists regardless of *Finn*.

different claims and even involve different parties: Mark Cameron was GM's party-opponent in the *Cameron* case; his attorney, James Butler, is its party-opponent here.

Moreover, GM's proffered distinction—that, unlike *D. Patrick* and *Blalock*, this case involves the "invo[cation of] judicial contempt powers to enforce an order of ongoing vitality" (*id.*, 17)—is ephemeral. By definition, *all* contempt claims relate back to some extant, prior order that the purported contemnor is alleged to have violated. The underlying orders at issue in *D. Patrick* and *Blalock* were no less "vital" than the Fourth Circuit order at issue here.

To the contrary, in *D. Patrick*, although the Seventh Circuit properly held, as a matter of *law*, that there is no independent cause of action for civil contempt, it actually proceeded to address (and to affirm the dismissal of) the particular complaint at issue on the merits because the court recognized, as a matter of *fact*, that the district court had expressly reserved jurisdiction to revisit its underlying order (a judgment of dismissal pursuant to a settlement agreement) through its contempt powers, if necessary. *See* 8 F.3d at 460-61. Here, by contrast, the Fourth Circuit did not expressly reserve jurisdiction after the *Cameron* settlement and had no legal basis for presiding (as a court of first instance) over GM's contempt claim after that suit ended.

Indeed, this Court has unanimously held that, once a settlement results in a case's outright dismissal, federal jurisdiction over the matter is lost. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). If that was true in *Kokkonen*, where the issue concerned one party's compliance with the settlement that occasioned the dismissal, then it should equally be true here, where the issue concerns the far weightier subject of judicial contempt and where the "vestigial" claim involves a non-party to the original suit (*i.e.*,

one party's attorney).

GM's effort to distinguish *D. Patrick*, *Blalock*, and *Finn* is also surprising in view of the position taken by its counsel in another petition presently pending before the Court. In a petition filed only two months before their current opposition brief, GM's counsel cited all three of these cases for the very proposition that Butler advances here: that "[a] court's civil contempt powers . . . are limited to affording *compensatory or coercive* relief in an *ongoing proceeding*; that is why 'there is no such thing as an independent cause of action for civil contempt.'" Pet. at 7, *E.I. DuPont de Nemours & Co. v. Bush Ranch, Inc.*, ___ U.S.L.W. ___ (May 8, 1997) (No. 96-1777) (hereinafter "*DuPont* Pet.") (emphasis added). Not long ago, therefore, GM's counsel agreed with Butler's argument and with the need for this Court to address this issue.

Finally, GM's reliance on this Court's decisions in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), and *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), is misplaced. *See* Opp., 16. Neither case involved the judicial contempt power. Rather, both involved Rule 11 sanctions. *See Willy*, 503 U.S. at 132-39 (holding that, on the facts presented, Rule 11 sanctions could survive a *subsequent* determination that the district court lacked jurisdiction); *Cooter & Gell*, 496 U.S. at 393-98 (holding that voluntary dismissal of a complaint did not divest the district court of power to impose Rule 11 sanctions for the baselessness of that complaint).[4/]

[4/] Indeed, GM's counsel has acknowledged that "*Cooter & Gell* does not remotely stand for the proposition that a court may at any time entertain a private *criminal* contempt action or an independent *civil* contempt action." *DuPont* Pet. at 8 n.1.

The exercise of power under Rule 11, which is an express grant of judicial authority, involves different considerations and poses far fewer constitutional concerns than the exercise of an "inherent" contempt power. And while Rule 11 sanctions may survive the absence of jurisdiction, civil contempt sanctions may not. *See Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1552 (10th Cir. 1996) ("in the absence of subject-matter jurisdiction, Rule 11 sanctions are enforceable while a civil contempt citation is not") (citing *Willy*); *see also* Pet., 27-30.

II. The Proceeding Below Was Impermissibly Criminal.

GM characterizes as "frivolous" Butler's assertion "that the Fourth Circuit's sanction is punitive rather than compensatory" and hence, impermissibly criminal. Opp., 12. As GM points out, the Fourth Circuit "took pains to emphasize that the sanction imposed here was compensatory . . . in nature." *Id.* (citing contempt order).

As this Court has held, however, the determinative consideration is not the sanctioning court's "subjective intent" or how it characterizes its order, but rather, how the proceeding was substantively conducted and the actual "character and purpose" of the sanction imposed. *International Union, UMWA v. Bagwell*, 512 U.S. 821, 828, 827 (1994) (citations omitted). Here, as the record reveals, the proceeding and sanction have the unmistakable indicia of a punitive action. *See* Pet., 8-10, 21-24. In GM's own words, the proceeding was conducted "to vindicate . . . the dignity of th[e] Court," *id.*, 112a, and as GM's counsel has conceded elsewhere, "[a] punitive action aimed at vindicating a court's authority, of course, is the very paradigm of a

criminal contempt action." *DuPont* Pet. at 7 (citing *Bagwell*).[5/]

Moreover, GM itself expressly asked for either civil *or criminal* penalties in its papers below—both before and after the show-cause hearing—and both GM and the Fourth Circuit expressly declined to clarify whether the proceeding was civil or criminal before, at, or even after that hearing. Pet., 6, 8-10, 11. The fact that the court subsequently dubbed its sanction "civil" when it issued its order ten months later does not make it so and does not satisfy Butler's due process right to know *in advance* the nature of the charge against him.[6/]

III. The Fourth Circuit's March 23, 1994 Order Was Ambiguous As A Matter Of Law.

Butler contends that the Fourth Circuit's March 23, 1994 order was precatory in its use of the verb "should" and thus, as a matter of law, could not constitute an unmistakable, injunctive command sufficient to support the court's $190,000

[5/] GM offers no response to the observation that if this proceeding is civil, then every criminal contempt proceeding may be rendered civil by ordering a fine to be based on attorney fees and paid to the complainant rather than the court. Pet., 23-24.

[6/] GM repeatedly criticizes Butler for "confus[ing]," "conflat[ing]," and "gloss[ing] over the critical distinction[s]" between different forms of contempt. Opp., 9, 15, 16. In fact, Butler's petition is based, in part, on the critical distinctions between civil and criminal contempt, which GM referred to as "pettifogging distinctions" below. Pet., 9 (quoting GM counsel). With respect to GM's alleged (but largely unexplained) distinction between coercive and compensatory *civil* contempt, however, Butler submits that there is no such distinction for purposes of the principle stated in *Gompers* that settlement of the underlying action terminates the civil contempt power. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 451-52 (1911); Pet., 24-25 & n.11.

contempt sanction. Pet., 16-18. GM assails this argument that there is a common-sense difference between "should" and "shall" as "belated sophistry." Opp., 14. According to GM, "[m]erely to restate this argument is to refute it." *Id.* Butler submits that precisely the opposite is true; indeed, the distinction could not be more fundamental.

Nor is Butler's argument on this point "a factbound challenge to the Fourth Circuit's application of settled law." *Id.* Again, as GM's own counsel has recently argued to this Court, "whether an order is clear enough to 'confor[m] to legal requirements [for contempt] is a question of law over which [the courts] retain plenary review.'" *DuPont* Pet. at 13 (citation omitted); *see generally id.*, 10-14.[7/]

Finally, GM's assertion that *United States v. Robinson*, 922 F.2d 1531 (11th Cir. 1991), and *In re Baum*, 606 F.2d 592 (5th Cir. 1979), are inapposite because "both were *criminal* contempt proceedings that involved wholly different facts" is unavailing. Opp., 14-15. The relevance of those cases resides not in the types of contempt they involved but in the fact that, in contrast to the Fourth Circuit here, those courts found similarly vague orders to be insufficiently specific as a matter of law to support a finding of contempt. *See* Pet., 17 & n.5. Moreover, while GM is correct that *Robinson* was a criminal contempt case, *In re Baum* was civil.

IV. Petitioner Was Entitled To An Evidentiary Hearing.

In responding to Butler's assertion that the Fourth Circuit

[7/] In any event, even if this argument did constitute only a "factbound challenge," that fact would only further undercut GM's assertion that there was no genuine issue of material fact here sufficient to support Butler's request for an evidentiary hearing. *See* Part IV, *infra*; Opp., 10-12.

denied him due process when it denied him an evidentiary hearing, GM concedes that if Butler had presented a genuine issue of material fact, he would have been entitled to such a hearing. Opp., 11. This concession yields the point.

Butler plainly presented the court of appeals with genuine issues of material fact, both at the initial contempt phase and at the subsequent sanctions phase. At the contempt phase, Butler observed that there was no evidence before the court that his actions had *actually caused any harm* to GM in the *Moseley* and *Cockrum* cases—a necessary finding for any compensatory civil contempt ruling.[8/] Because GM offered no evidentiary showing of causation or harm at all at that phase of the proceedings, *see* Pet., 10, the court either should have dismissed the case outright or else ordered GM to submit some evidence. Instead, the court found as a matter of fact on an empty record that "[t]here is no question that GM was injured;" "suffered a compensable loss;" and was forced "to incur a considerable expense to defend [the *Moseley* and *Cockrum*] actions." *Id.*, 7a; *see also id.*, 11-12.

Thus, when the court referred the matter to Judge Doumar "'for review and determination of the proper amount to be assessed'" against Butler, *id.*, 12, it was foreordained that Judge Doumar would recommend a substantial monetary fine. Judge Doumar himself recognized that his hands were tied in this respect by the Fourth Circuit's order. *See id.*, 20-21 n.8. Notwithstanding this fact (and the fact that Butler continued to be denied both access to GM's allegedly supporting evidence

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[8/] *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 304 (1947); *In re Kave*, 760 F.2d 343, 351 (1st Cir. 1985); *see also Rowe v. General Motors Corp.*, 586 F. Supp. 368, 369 (N.D. Ga. 1984) (holding that GM's noncompliance with a court order could not support a contempt finding because the complainants "failed to prove that they were harmed by [the] noncompliance").

and the opportunity for a fair and open hearing and cross-examination, *id.*, 12-13), Butler still managed to demonstrate genuine issues of material fact at the sanctions phase of the proceeding: the court reduced GM's claimed "damages" in the *Moseley* and *Cockrum* cases by 76%. *See id.*, 13.

In taking Butler to task for failing to articulate what compelling evidence he would have presented if granted an evidentiary hearing, GM and the court below fundamentally misconstrue both Butler's objection and the law. As the Fourth Circuit itself acknowledged, the legal burden was on *GM*, not Butler, to prove both its contempt claim and the fact, amount, and cause of its alleged damages. *Id.*, 6a, 40a.[9/] The question, then, is not what Butler would have shown but rather, what GM would have shown and whether its showing could have withstood the scrutiny of cross-examination and rebuttal evidence in open court. In denying Butler the chance to test GM's proof, the Fourth Circuit's decision conflicts with the decisions of other courts that would have granted him that chance. *See id.*, 18-21.[10/]

[9/] There is a split of authority on whether the damages, like the contempt itself, must be proven by "clear and convincing" evidence or only by a "preponderance" of the evidence. *See* Pet., 40a (citing cases).

[10/] GM mischaracterizes and quotes out of context various statements by Butler's counsel to suggest that Butler had no evidence to offer and was willing to stand on the current record. *See* Opp., 10-11. In fact, Butler submitted substantial evidence that contradicted GM's showing and repeatedly objected to the absence of a proper hearing and exchange of evidence. In addition, the statements in question were all expressly premised on the fact that, without having access to GM's *in camera* showing or an opportunity for cross-examination, Butler could not responsibly identify what further evidence he might need to present.

V. The Court Disfavors Interlocutory Petitions.

In closing, GM half-heartedly suggests that Butler's petition should have been filed earlier. Opp., 18. In the same paragraph, however, GM concedes that the petition is timely. *Id.* In fact, because the Fourth Circuit's contempt order did not become final until the issuance of its sanctions order, the petition is both mature and timely, and an earlier interlocutory petition—based on the contempt order alone—would have been disfavored. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (holding, in an analogous context, that the Court will review an earlier decision where review of a later decision, which ends the matter, calls upon the Court to notice and rectify errors in the first decision, and noting the oft-stated tenet that interlocutory petitions are disfavored); *In re Tetracycline Cases*, 927 F.2d 411, 413 (8th Cir. 1991) ("in the absence of the amount of the compensatory sanction the contempt order is not final").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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